4-B. OTHER CASE EXAMPLES OF CHANGES OR EXPANSIONS.

The Court's test in the *New London* case, using words like "substantial" and "a natural activity," may seem about as easy to pin down as a greased pig. The best approach is to look at the decided cases:

(i) *McKinney v. Riley*, 105 N.H. 249 (1964). A junkyard owner whose operation had been part-time, with only 5 or 6 cars at a time, was held **not "grandfathered"** for a full-time operation with 100 cars. [Note: Junkyards are now controlled by statute, RSA 236:90 et seq., but the case is still good law on the issue of expanding a nonconforming use.J

(ii) ***New And Better Technology Allowed***: In *New London v. Leskiewicz*, 110 N.H. 462 (1970), the nonconforming use was for picnicking and tent camping, and the court said it could legally be expanded to include camper-trailers without a substantially different impact on the neighborhood:

> **"The fact that improved and more efficient or different instrumentalities are used in the operation of the use does not in itself preclude the use made from being a continuation of the prior nonconforming use, provided such means are ordinarily and reasonably adapted to make the established use available to the owners and the original nature and purpose of the undertaking remain unchanged."** (at 467, citations omitted)

(iii) ***Increased Intensity Ok, But No Expansion In Area:*** *Hampton v. Brust*, 122 N.H. 463 (1982) tells us that a nonconforming video arcade could replace its old pin-ball machines with video games (again, new technology for same use), and could increase the number of machines in the same room, but could not expand them into another room in the same building, which had previously been a conforming gift shop:

> **"(W)here there is no substantial change in the use's effect on the neighborhood, the landowner will be allowed to increase the volume, intensity or frequency of the nonconforming use. For example, a law firm in a building constituting a nonconforming use could increase its numbers of lawyers or clients, its internal and external use of its premises or amount of work activity. Similarly, a nonconforming restaurant could add more tables and chairs or serve more dinners."** (at 469, emphasis added.)

(iv) In *Cohen v. Town of Henniker*, 134 N.H. 425 (1991) it was held that the conversion of an apartment complex to a condominium form of ownership, when the conversion entails no actual change in the ***use*** of the property, is part of its "grandfathered" rights, and is not an illegal expansion.

(v) ***No Brand-New Buildings.*** In *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992), a nonconforming marina wanted to build a brand-new boat storage building,

claiming that it was a "natural expansion" of their marina business. Justice Johnson wrote:

> **"We have never permitted an expansion of a nonconforming use that involved more than the internal expansion of a business within a pre-existing structure... (Here) the new building clearly has a greater aesthetic impact on the abutting property than the other five buildings... (hence) will have a "substantially different impact on the neighborhood."** (citing New London)

(vi) ***"Appropriateness" Is Irrelevant***. In *Stevens v. Town of Rye*, 122 N.H. 688 (1982), the Supreme Court said a "grandfathered" auto garage couldn't change into a plumbing and bath supply shop, because that would be a substantial change in the nature and purpose of the use. The trial judge's finding that the bath shop was "better suited" to the neighborhood than the garage was held irrelevant.

(vii) *Ray's Stateline Market, Inc. v. Town of Pelham*, 140 N.H. 139 (1995). Ray's was a nonconforming convenience store in a residential district, with a coffee counter inside already. The new proposal was to relocate the coffee counter, without expanding the building, and also to replace an existing sign advertising Pepsi with a Dunkin' Donuts sign of the same dimensions. The ZBA said this was an illegal expansion, but the Court overturned the Board, and called this a "natural" expansion, citing the *New London* test and *Hampton v. Brust*. (***Query***: Would the result have been the same if an abutter had produced evidence that the switch to Dunkin' Donuts had caused a 4-fold increase in traffic and illegal parking?

[I guess a donut is a donut, dare you find holes in that argument!]

(viii) *Conforti v. City of Manchester*, 141 N.H. 78 (1996). The owner of a "grandfathered" movie house in a residential neighborhood started having live entertainment (rock concerts). The Court applied the *New London* test and found that the live entertainment was an illegal expansion of the use because it had a "substantially different effect on the neighborhood," because of the noise.

(ix) ***"Grandfatlzered" Accessory Use Unlikely To Be Allowed To Become Primary Use***. *Town of Salem v. Wickson*, 146 N.H. 328 (2001) Wiskson's land had been a nonconforming farm. As part of the farm, chicken and pig manure had been stored, mixed with sand trucked onto the property, and sold as fertilizer. Later the farm operation ceased, but the owner kept trucking sand and other earth materials onto the property to stockpile it for sale. The question was whether the continuation of this use, without the underlying farm use, was an illegal change in the nonconforming use. The Court said it was.

Here the change flunked two parts of the *New London* test. The present earth stockpiling was not subordinate and incidental to farming. The heart of nonconforming uses is ***investment-backed expectations***. The original use, in which there was such an expectation, was farming, not stockpiling earth. There was also evidence of an much different impact on neighbors. [Oink Oink!]